California finds no difference between dishonest intention at the time of conveyance and later. *Hillyer* v. *Hynes*, 33 Cal. App. 506; *Hatcher* v. *Hatcher*, 264 Pa. St. 105, accord. And in a case of confidential relationship, *Bradley* v. *Bradley*, 165 Cal. 237, the court talks about the grantee taking an unconscionable advantage over the confiding trustor, although in the same case, which came up later, 37 Cal. App. 263, the court simply said that the breach of the promise is "constructive fraud" where there is a confidential relation, thus declaring in accord with the principal case. Yet, finding "constructive fraud" where there is a breach of promise by one in a confidential relation is a departure from the logic of the situation. A constructive trust is a remedial device to do justice, and has nothing to do with the statute of frauds. See *Davies* v. *Otty*, *supra*. One wonders if the American courts will not eventually put it squarely on this ground. See article by G. P. Costigan, Jr., 12 MICH. L. REV. 515.

TRUSTS—INVESTMENTS—CORPORATE STOCKS.—A trustee invested trust funds in preferred stock of a private corporation which failed. In an action by the beneficiaries against the trustee for losses, *held*, that he is not liable. *In re Buhl's Estate* (Mich., 1920), 178 N. W. 651.

This case decides this point for the first time in Michigan. It follows the Massachusetts rule, substantially, allowing a trustee to invest in the stock of a private corporation if the corporation is one in which a prudent man of intelligence in such matters would invest when seeking a permanent investment, the primary object of which is the preservation of the fund, the obtaining of income being of secondary importance. This rule was laid down in *dicta in Harvard College* v. *Amory*, 7 Pick. 446, and is followed in Massachusetts and some other states. *Lovell* v. *Minot*, 20 Pick. 116 (notes secured by stocks in manufacturing company); *Kimball* v. *Whitney*, 233 Mass. 321, in which the court upheld investment in certificates of an unincorporated holding company; *Washington* v. *Emery*, 57 N. C. 32 (administrator); see *Dickinson, Appellant*, 152 Mass. 184. The opposing rule in the United States is the so-called New York rule, which holds that the fiduciary relation necessarily excludes placing funds beyond control of trustee, where they can be exposed to the hazard of loss or gain, according to the success of the enterprise, in the absence of authority given in the trust instrument, or by statute or order of the court controlling the trust. *King* v. *Talbot*, 40 N. Y. 76· *Worrell's Appeal*, 23 Pa. 44 (guardian); *Commonwealth* v. *McConnell*, 226 Pa. St. 244 (lunatic committee); *Tucker* v. *State*, 72 Ind. 242 (guardian); see *White* v. *Sherman*, 168 Ill. 589. This is the majority rule. Authority of the settlor, however, given in the trust instrument, protects the trustee. *Willis* v. *Braucher*, 79 Ohio St. 290. It seems as though the New York courts recognize a harshness in the rule. *In Matter of Hall*, 164 N. Y. 196, where authority was given to invest in real or personal securities as trustees should see fit, the court intimates that if they had invested in stocks other than those of new and untried companies, they would not have been liable. And in *In re McDowell*, 169 N. Y. S. 853, where trustees by the instrument

were given discretion, the court intimates that if they had invested in seasoned securities they would not have been liable. And see *In re Tower's Estate*, 253 Pa. St. 396. The principal case goes only so far as to allow investment in preferred stock, but it would be expected that the court would go as far as the Massachusetts court. It would seem that Michigan has followed the wiser rule, to apply in the situation where the trustee is without specific authority, in this day where funds are many and gilt-edged investments are few, and where many corporations are as safe a permanent investment as are the orthodox permissible trust investments. See McKinney, Liabilities of Trustees for Investments; 16 Ann. Cas. 69.

Trusts—Trust Funds Mingled with Funds of Trustee—Presumption in Case of Withdrawals and Subsequent Deposits.—A trustee wrongfully mingled trust funds with money of his own in his personal bank account. Withdrawals reduced the balance to less than the amount of the original trust fund. Subsequent deposits by the trustee from his own money left a balance greater than the amount of the trust fund. In an action to recover the money thus wrongfully mingled, *held*, that even though there was no actual intent to make restoration, the trustee's motive in making these deposits is immaterial and he must be presumed to have restored the trust fund. *Hungerford* v. *Curtis* (R. I., 1920), 110 Atl. 650.

Where the trustee has wrongfully mingled his money with trust funds, any withdrawals by him will be presumed to have been made from his own money. Thus, so long as a balance remains equal to the amount of the trust fund, the claimant can have full satisfaction. *Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Board of Fire and Water Commissioners* v. *Wilkenson*, 119 Mich. 655; *Southern Cotton Oil Co.* v. *Elliotte*, 218 Fed. 567. If, after making withdrawals resulting in a balance less than the original trust moneys, the wrongdoer makes deposits from other sources, such sums cannot be attributed to the trust account. *Powell* v. *Mo. & Ark. Land Co.*, 99 Ark. 553; *Covey* v. *Cannon*, 104 Ark. 550; *Board of Commissioners* v. *Strawn*, 157 Fed. 49; *Hewitt* v. *Hayes*, 205 Mass. 356; *American Can Co.* v. *Williams*, 178 Fed. 420. Cases holding that such additions must be regarded as a restoration of the trust funds will be found to rest, it is believed, on an actual intent of the wrongdoer to make restitution, or upon circumstances from which such an intent could reasonably be inferred. *Jeffray* v. *Towar*, 63 N. J. Eq. 530; *State Savings Bank* v. *Thompson*, 128 Pac. 1120; *United National Bank* v. *Weatherby*, 70 App. Div. (N. Y.) 279; *In re Northrup*, 152 Fed. 263. At least in the face of an intent to the contrary, no court seems to have indulged in the presumption that the wrongdoer meant to make restoration. It is submitted that the holding of the court in the instant case to the effect that the actual intent is immaterial is at least misleading. The presumption that the wrongdoer meant to make reparation may not be a violent one, in view of his obvious duty to do so, but at the most it is no more than a presumption and cannot stand in the face of evidence. Such is the rule with reference to the presumption that the wrongdoer withdraws his own money first.